

No. 15675

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

JULIA MAE THOMAS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANT
JULIA MAE THOMAS.

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OPENING BRIEF OF APPELLANT JULIA MAE THOMAS.

Jurisdictional Statement.

I.

Jurisdiction of the District Court.

18 United States Code, Section 3231, provides that:

“The District Courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States.”

Appellant was charged in the United States District Court for the Southern District of California, Central Division, in Indictment No. 25712 of violation United States Code Title 21, Section 174. (Illegal sale of narcotics.) [Tr. p. 1.]

II.

Jurisdiction of This Court Upon Appeal to Review the Judgment.

28 United States Code, Section 1291, reads:

“The Court of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . . except where a direct review may be had in the Supreme Court.”

28 United States Code, Section 1294, reads, in part:

“Appeals from reviewable decisions of the District and territorial Courts shall be taken to the Court of Appeal as follows: 1. From a District Court of the United States to the Court of Appeal for the Circuit embracing the district; . . .”

Appellant filed her Notice of Appeal on May 24, 1957 from the Judgment entered by the District Court on May 20, 1957. [Tr., p. 39.]

Statement of the Case.

Appellant was accused of the illegal sale of narcotics, violation of U. S. C. Title 21, Section 174, in an indictment returned on February 27, 1957, No. 25712. On March 18, 1957, appellant entered her plea of not guilty to the offense charged. Trial was had on May 2nd and 3rd, 1957, at which time appellant was convicted by a jury of the offense alleged in the indictment. On May 20, 1957, appellant was sentenced to a period of imprisonment of twenty years and to pay a fine to the United States in the sum of \$5,000.00. [Tr. p. 36.]

The testimony brought out at the trial was that of the Federal Narcotics Agents who testified that they had purchased narcotics from appellant, and in defense, the only

testimony brought out by appellant was her denial of the transactions. At this time, we make no question as to the sufficiency of the evidence to sustain the conviction. However, during the pendency of the trial, appellant's sole trial counsel, Philip S. Schutz, asked leave of Court for early adjournments on two grounds, one that he was not in good health, and two, that he wished additional time to confer with his client over certain developments in the case that had occurred at the trial. Both these requests for adjournment were reasonable under the facts, and trial counsel did not request more than a short respite. The trial Judge denied the request for early adjournment and forced trial counsel to proceed with his defense at the trial. [Rep. Tr. of Proceedings pp. 23, 24; pp. 96-100.] Appellant bases her appeal on the ground that the denial of a reasonable request for an early adjournment under the circumstances of this case, considering the nature of the case, and the penalties involved, was an abuse of discretion upon the part of the trial Court.

The first question involved in this appeal is, whether the appellant was denied a fair trial by the ruling of the Court denying appellant's Motion for an Early Adjournment of the trial after appellant's counsel, Mr. Schutz, became ill, but was forced to continue with the defense of appellant.

The second question presented is whether the Court abused its discretion in denying appellant's Motion for Early Adjournment on the ground that he needed further time in which to prepare his defense, in view of the seriousness of the charge and the penalties involved for violation of the Federal Narcotics Laws.

Specifications of Error.

I.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR EARLY ADJOURNMENT ON THE GROUND OF ILLNESS OF COUNSEL.

II.

THE COURT ERRED IN DENYING APPELLANT'S MOTION FOR EARLY ADJOURNMENT ON THE GROUND THAT COUNSEL NEEDED MORE TIME TO PREPARE ITS DEFENSE.

ARGUMENT.

The Denial of Appellant's Motion for Early Adjournment of the Trial After the Illness of Her Counsel and in Order to Further Prepare Her Defense, Deprived Appellant of the Effective Aid and Assistance of Counsel of Her Own Choosing, in Violation of the Fifth and Sixth Amendment of the United States Constitution.

(The two grounds of this Appeal, illness of trial counsel, and the need for further time for preparation of the defense, are so interwoven under the facts of this case, that appellant's arguments will be directed to both under the same general heading of denial of effective assistance of counsel, rather than to have two separate headings and arguments.)

On Thursday, May 2, 1957, at the afternoon session of the appellant's trial, Mr. Schutz, appellant's sole trial attorney, asked the Court for early adjournment on the ground that he was not feeling well. [Rep. Tr. pp. 23, 24.] After the case had been on trial all afternoon and late that afternoon, after the Government had rested its case and the defense was about to begin on its case, Mr. Schutz again informed the Court of his illness and requested that

he not have to go on further that day. [Rep. Tr. pp. 96-100.] The Court did not seem to be disposed to grant Mr. Schutz' request and Mr. Schutz added further reasons for his wish for an adjournment, in that he felt that he required at least the overnight period so that he might discuss the case with his client and prepare additional evidence and defenses to meet the Government's case. It was after 4:00 P.M. when the second request was made. [Rep. Tr. p. 101.] The trial Judge refused to postpone the case until the next day, and insisted Mr. Schutz continue, which Mr. Schutz did. [See Rep. Tr. pp. 23, 24; pp. 96-100.]

It is submitted that the trial Judge's refusal to grant the modest continuance requested by defense counsel was an abuse of discretion and under all the circumstances of the case, in view of the severity of the penalty actually imposed, and, of course, the seriousness of the nature of the indictment itself, this failure to grant a continuance was a violation of defendant's Constitutional rights to "assistance of counsel" as provided in the Sixth Amendment to the Constitution of the United States.

It is submitted that appellant was denied the effective aid and assistance of her trial counsel and therefore, in effect, was denied the assistance of counsel of her own choosing. [See affidavit of counsel and appellant in Appendix.]

The Constitutional right of an accused to have assistance of counsel contemplates effective assistance. Hence, the right is abridged when counsel cannot be effective because he is feeling ill during the trial.

United States v. Bergame, 154 F. 2d 31.

While a reading of the Transcript may not show, in an obvious way, that defendant did not have effective aid of counsel, still, such a showing is not required. If defendant is deprived of the effective assistance of counsel, that is sufficient for an Appellant Court to reverse, since it is not required that the defendant prove affirmatively the exact prejudice produced by such deprivation.

Glasser v. United States, 315 U. S. 60, 71, 62 S. Ct. 457, 465;

United States v. Venuto, 182 F. 2d 519.

The accused's rights to effective assistance of counsel is too fundamental a right to permit a Court to indulge in nice calculations as to amount of prejudice arising from its denial.

Butzman v. United States, 205 F. 2d 343;

Glasser v. United States, *supra*.

Where counsel becomes ill during the course of a trial, it is an abuse of discretion to deny a Motion for a reasonable continuance where there are no associate counsel to continue the case. And this would be especially so in a criminal case where the penalty upon conviction is as great as twenty years imprisonment.

22 Corpus Juris Secundum 748, Section 484(b) and cases cited;

17 Corpus Juris Secundum 217, Section 36 and cases cited;

People v. Davis, 48 Advance Cal. 239.

Appellant candidly admits that trial counsel did not vociferously insist upon his motion being granted. How-

ever, it can be seen from the remarks of the trial Judge, that such motion would have been peremptorily denied had it been pursued any further. [Rep. Tr. pp. 96, 97.]

The language of *Coplon v. United States*, 191 F. 2d 749, 760, is apropos of this case:

“A defendant in a criminal case may not legally be found guilty except in a trial in which his Constitutional rights are scrupulously observed. No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty.”

If trial counsel had not become ill, appellant admits the trial Court would not have abused its discretion in denying appellants motion for an early adjournment to further prepare her defense. However, under all the circumstances surrounding this trial, and especially the fact that trial counsel became ill, it was an abuse of discretion for the trial Court to force counsel to continue with the defense. While the ability to think on his feet and adjust to the many twists and turns that a criminal trial takes is the mark of the competent attorney, and certainly Mr. Schutz is competent, where counsel advises the court that he is sick, and where the stakes are so high (twenty years in the Penitentiary) it would appear that natural justice and due process of law would permit, nay, require, at least the short adjournment requested.

Conclusion.

Because of the fact that appellant's trial counsel became ill during the course of the trial, and also because trial counsel advised the Court that he needed a short continuance in order to more adequately prepare his defense, and the fact that the Court denied said requests, appellant was denied the effective assistance of counsel as required by the sixth amendment of the United States Constitution and therefore was denied a fair trial in contravention of the Due Process clause of the fifth amendment to the United States Constitution.

WHEREFORE, appellant requests this Honorable Court to reverse the judgment below and grant her a new trial.

Respectfully submitted,

MINSKY & GARBER,

By BERNARD W. MINSKY,

Attorneys for Appellant.

APPENDIX.

Affidavit of Phillip S. Schutz.

In the United States Court of Appeals for the Ninth Circuit, State of California.

Julia Mae Thomas, Appellant, vs. United States of America, Appellee. No. 15675.

PHILLIP S. SCHUTZ, being first duly sworn, deposes and says:

That he was trial counsel for the defendant in the above matter, JULIA MAE THOMAS. That after the case was called for trial and during the trial, your affiant, on two occasions, requested the Trial Judge to adjourn at an early hour [P. S. S.], because your affiant felt sick and nauseous. Your affiant had a history of this type of illness and realizes that it comes upon him suddenly without prior notice. Your affiant has been told by his doctors that this particular sickness is the result of tension and nervous strain and that while it is brief in duration, it does require a rest before it passes.

That when your affiant's request for continuance was denied, your affiant continued with the defense to the best of his ability but there were times during the course of the trial when your affiant felt lightheaded, giddy and nauseous. This affected his proper concentration upon the examination of witnesses and also affected your affiant's ability to communicate with his client. Your affiant had a difficult time in discussing the case as it progressed during the trial with his client, and, therefore, your affiant feels that under the circumstances he did not present his defense to the best of his normal ability.

PHILIP S. SCHULTZ,

PHILLIP S. SCHUTZ.

Subscribed and sworn to before me this 11th day of October, 1957.

ROBERT BARNETT,

Notary Public in and for said County and State.

Affidavit of Julia Mae Thomas.

In the United States Court of Appeals for the Ninth Circuit, State of California.

Julia Mae Thomas, Appellant, vs. United States of America, Appellee. No. 15675.

JULIA MAE THOMAS, being first duly sworn, deposes and says:

That she is the appellant in the above matter. That during the course of her trial, it became obvious to her that her attorney, Phillip S. Schutz, was not feeling well. That during conversations with her attorney, he told her that he had a feeling of nausea, lightheadedness and giddiness, and told your affiant that he did not feel that under the circumstances he could properly conduct her defense. That there were times during the course of the trial when your affiant and her attorney were conversing that it appeared to your affiant that Mr. Schutz was not listening to her and did not understand what she said. At other times during the trial, the conversation of Mr. Schutz was unintelligible to your affiant.

That in the opinion of your affiant, Mr. Schutz was not able to give an effective defense.

JULIA MAE THOMAS,
JULIA MAE THOMAS.

Subscribed and sworn to before me this 11th day of October, 1957.

ROBERT BARNETT,
Notary Public in and for said County and State.